UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
Washington, D.C.

In the Matter of:	*	
ELDON ENGEL,	*	**DOCKET NO. 07-3445-DB**
SANDRA RILEY,	*	**DOCKET NO. 07-3446-DB**
HOWARD SMITH, and	*	**DOCKET NO. 07-3447-DB**
RICHARD SNYDER,	*	**DOCKET NO. 07-3448-DB**
Respondents.	*	

DEBARRING OFFICIAL'S DETERMINATION

INTRODUCTION

By separate Notices dated August 30, 2007 ("Notice"), the Department of Housing and Urban Development (HUD) notified RESPONDENTS **ELDON ENGEL, SANDRA RILEY, HOWARD SMITH,** and **RICHARD SNYDER** that HUD was proposing their debarment from future participation in procurement and nonprocurement transactions as a participant or principal with HUD and throughout the Executive Branch of the Federal Government for a three-year period from the date of the final determination of this action. Respondents also were advised in the respective September 24, 2007, Notices that their proposed debarment was in accordance with the procedures set forth in 24 CFR part 24[1].

In addition, the Notices informed Respondents that their proposed debarment was based upon the acts and omissions of the Columbus (Nebraska) Housing Authority (CHA) during the time that Respondents Engel, Riley, and Snyder were members of the CHA Board of Directors and Respondent Smith was the Executive Director of the CHA. The Notices went on to advise each of the Respondents that the "acts and omissions of the CHA [were] imputed to [them] pursuant to 24 CFR § 24.630(b) because, as [CHA Board members and, in the case of Respondent Smith, as the CHA Executive Director, they] participated in, had knowledge of, or had reason to know of the violations" described in the Notices.

[1] HUD published a final rule on December 27, 2007 (72 FR 73484) that relocated and recodified 24 CFR part 24 as 2 CFR part 2424. HUD's December 27, 2007, rule stated that the rule "adopts, by reference, the baseline provisions of 2 CFR 180 "the government-wide rule published by OMB on August 31, 2005 (70 FR 51863) setting forth guidance for agencies with respect to nonprocurement debarment and suspension. For the convenience of the reader, references herein will be to the regulations at 2 CFR part 180.

HUD first charges the CHA with violating Section 7 of the Annual Contributions Contract (ACC), by encumbering CHA property without HUD's authorization.

As detailed in the Notices to the Board members, HUD alleges that in a CHA Board meeting on September 20, 2004, the three members voted in favor of CHA's entering into two promissory notes with the First National Bank and Trust Company of Columbus (FNB) for $81,023.60 and $100,000.00, respectively. The CHA failed to obtain HUD's authorization to enter into the two promissory notes with the FNB. Both notes had a maturity date of March 31, 2005. Proceeds from the notes were used in the development, as described in the Notices, of a private low-income housing project known as Crown Villa. Both promissory notes contained a clause authorizing FNB to seize CHA deposits if CHA failed to make the loan payments. CHA defaulted on the notes and on August 22, 2005, FNB duly seized CHA funds on deposit with FNB. The deposits were held in five different accounts and amounted to $88,062.80. The Notices assert that the seized deposits were public housing funds covered by the ACC.

The actions of the CHA, including Respondent Smith as its Executive Director, the Notices charged, also violated Section 9(C) of the ACC by allowing CHA's assets to be encumbered and eventually used for improper purposes. The Notices advised Respondents that under Section 9(B) all funds held by the CHA in connection with the development of the housing authority must be deposited in the "General Fund," and set forth the only purposes for which the General Fund monies can be used.[2] The Notices recited that "CHA, through its actions described above, allowed its assets to be used for purposes not specifically authorized by the ACC." The Notices further charged that between March 11, 1998, and August 31, 2003, CHA advanced an additional $152,081.25 to $173,196.28 from CHA's General Fund on behalf of Crown Villa.[3] These advances, the Notices averred, because HUD did not approve them, violated Section 9(C) of the ACC.

The respective Notices advised each of the Respondents that in view of their position in CHA, they "have been involved in covered transactions. [And their] actions as described [in the Notice] are evidence of serious irresponsibility and are cause for [their] debarment under the provisions of 24 CFR 24.800(b) and (d)."

A telephonic hearing on Respondents' proposed debarment was held in Washington, D.C. on March 26, 2008, before the Debarring Official's Designee, Mortimer F. Coward. Respondents and their attorneys participated by phone at the hearing. Respondents were represented by Eugene G. Schumacher, Esq., and David J. Lamphier, Esq. Brendan Power, Esq. appeared on behalf of HUD.

---

[2] General Fund monies may only be used for: (1) the payment of the costs of development and operation of the projects under ACC with HUD; (2) the purchase of investment securities as approved by HUD; and (3) such other purposes as may be specifically approved by HUD.

[3] The respective notices indicate different dates and amounts that were advanced by CHA. With respect to Respondents Engel, Riley, and Snyder, their Notices show that $152,081.25 was advanced between March 9, 2000, and August 31, 2003. Respondent Smith's Notice indicates that between March 11, 1998, and August 31, 2003, $173,196.28 was advanced.

Summary

I have decided, pursuant to 2 CFR part 180, to debar each of the Respondents from future participation in procurement and nonprocurement transactions, as a participant, principal, or contractor with HUD and throughout the Executive Branch of the Federal Government, for a period of three years from the date of this Determination. My decision is based on the administrative record in this matter, which includes the following information:

(1) The Notices of Proposed Debarment and Suspension dated August 30, 2007.
(2) A response that serves as Respondents' "written opposition and hearing request" (with attachments and exhibits) dated September 27, 2007, from Respondents' attorney addressed to the Docket Clerk.
(3) The four Government's Brief[s] in Support of Three Year Debarment filed January 10, 2008 (including all attachments and exhibits thereto) against each of the Respondents.
(4) Respondents' Brief Opposing Three-Year Debarment filed March 18, 2008.
(5) Government's Request for Leave to File Supplemental Documents for Government's Brief in Support of Three Year Debarment (with Exhibits 19 through 24 attached) filed March 24, 2008.
(6) Respondents' Supplemental Exhibits and Brief filed April 2, 2008.
(7) Respondents' Unopposed Request for Leave to File Additional Exhibit filed April 30, 2008.
(8) HUD's Reply to Respondents' Supplemental Exhibits and Brief (with Exhibit 25 attached) filed May 6, 2008.
(9) Respondents Filing of Exhibit No. 49, filed May 12, 2008.
(10) The digital recording of the March 26, 2008, hearing.

Government Counsel's Arguments

Government counsel argues that the respondents are subject to debarment pursuant to 2 CFR part 180. Each of the Respondents is a "person" or "participant" as defined in the debarment regulations. In the case of Respondents Engel, Riley, and Snyder, each of them is a member of the Board of Commissioners of CHA, which administers HUD programs and has entered into an ACC with HUD. Further, they are responsible for supervising and controlling the operation of CHA, and are authorized to commit the CHA in covered transactions such as subsidies and contracts. Similarly, Respondent Smith, as the Executive Director of CHA, has the authority to act on behalf of CHA and to commit the CHA in covered transactions.

Government counsel argues that all four Respondents were "intimately involved in CHA's improper use of General Fund monies to finance" Crown Villa. CHA spent $152,081.00 of its General Fund monies for expenses related to Crown Villa, although HUD had approved only $50,000.00. CHA did not request nor receive HUD's authorization to spend the additional $102,081.00 and has not repaid any of the funds spent.

In describing the alleged wrongdoing by the CHA and its Board, Government counsel first refers to the vote of the three Respondent Board members at a Board meeting on September 13, 2002. The three Respondent Board members voted to adopt a resolution acknowledging the transfer of monies to Crown Villa from the public housing program. The resolution also recognized CHA's agreement to make further advances beyond the $150,000.00 that had been transferred to Crown Villa as of September 9, 2002. The additional funding, according to the Resolution, would be provided until the Crown Villa project was financially viable.

Government counsel notes that Respondent Smith, who was present at the September 13, 2002, Board meeting, signed the resolution as the Secretary/Treasurer of the CHA. In this regard, counsel further notes that, in a July 29, 2004, letter addressed to Respondent Smith, the local HUD office directed the "CHA and the CHA's board to **discontinue the use of public housing funds for the Crown Villa project immediately."** (Emphasis in original) The letter expressed the concern of the local HUD office that CHA was carrying a receivable of over $250,000.00 from Crown Villa because Crown Villa "does not generate enough revenue to meet the financial obligations for the financing of the project."

Government counsel points out that, notwithstanding the July 29, 2004, letter from the HUD local office, at a Board meeting attended by Respondent Smith the three Respondent Board members voted to authorize CHA to extend two promissory notes that financed Crown Villa activities. Both notes contained a clause that authorized FNB to take possession of CHA funds on deposit with the bank if CHA defaulted on the loan payments. Counsel asserts that the Respondent Board members, in voting to authorize the notes, well knew, as did Respondent Smith, that the funds on deposit with FNB were General Fund monies as well as "part of CHA's 'project' as it is defined in the ACC."[4] Respondent Smith later executed the two notes on behalf of CHA.

The CHA was unable to pay off the notes. On August 22, 2005, FNB seized all of CHA's funds on deposit with FNB. The funds, which amounted to $88,062.80, represented four accounts totaling $81,515.02. The funds were General Fund monies and also part of the CHA's "project," counsel contends. Government counsel further contends that the balance of $6,547.78 of the total amount seized was the service program account, which "falls within the CHA's 'project' given the broad parameters of the term as it is defined by the ACC."[5] Counsel adds that in May 2005, Crown Villa was purchased by Tier One Bank in a trustee's sale and a deficiency judgment was entered against Crown Villa.

Government counsel argues that, in the first instance, there is cause for Respondents' debarment under 2 CFR 180.800(b)(1). The two promissory notes which the Respondent Board members authorized on September 20, 2004, and which Respondent Smith executed on September 29, 2004, and the $123,196.00 of General

[4] Gov't Briefs at 6 (discussion regarding Engel, Riley, and Snyder).
[5] *Id.* at 7.

Fund monies CHA spent on Crown Villa, were willful violations of Sections 7 and 9 of the ACC. Counsel added that the authorization and execution of the notes were "plainly a willful violation of the ACC, given the fact that Respondent[s] had recently been made aware, by [the] July 29, 2004, letter," of the unstable financial condition of Crown Villa and directed to cease using public housing funds for the Crown Villa project.

Counsel for the Government also argues that there is cause for debarment of Respondents Engel, Riley, and Snyder under 2 CFR 180.800(b)(2) because CHA gave Crown Villa $102,081.00 from its General Fund without HUD's authorization from March 2000 to August 2003, during their tenure as members of the Board of CHA. The Respondent members' conduct, counsel concludes, demonstrates a history of failure to perform in accordance with program requirements. Counsel makes the same conclusion with respect to Respondent Smith, except that in Smith's case the period of disbursement of funds to Crown Villa is from May 1998 to August 2003, during his service as Executive Director of CHA. Counsel adds that the violations discussed here are imputed to Respondents under 2 CFR 180.630(b) because they participated in, knew of, or had reason to know of the improper conduct.

Counsel argues that Respondents knew that their actions with respect to the promissory notes violated the ACC's prohibition against encumbering CHA's assets covered under the ACC. In addition to the July 29, 2004, letter from the local HUD office, CHA's own fee accountant recommended at the Board meeting of September 20, 2004, that Crown Villa be removed from the public housing books. Counsel rejects Respondents' argument that there was uncertainty with respect to FNB's setoff. Respondents also knew, according to Government counsel, that they were in violation of Section 9(C)(3) of the ACC by failing to obtain HUD's authorization to enter into the promissory notes. Counsel dismisses as "incorrect" Respondents' contention that a July 29, 1999, e-mail from a local HUD official, Charlie Hill, "somehow translates into HUD approval of the . . . promissory notes." The vagueness of the e-mail and the fact that it was written over five years before the promissory notes were executed means, counsel argues, it "could not even be remotely construed to constitute authorization for CHA to enter into loan agreements, five years in the future, that would place the authority's public housing funds at risk of possible seizure."[6]

Government counsel also argues that Respondents' contention that CHA had "HUD's approval and encouragement for [the CV] project" is without merit. Counsel notes that CHA specifically requested and received authorization from HUD to borrow $50,000.00 from its retained earnings account to purchase the land for Crown Villa. Thus, Respondents knew that CHA needed to obtain HUD's specific approval to use public housing program funds for Crown Villa. Further, Charlie Hill's May 24, 2000, letter approving CHA's use of the $50,000.00 requested required that the $50,000.00 be paid back. CHA has not repaid the $50,000.00, nor the additional General Fund monies advanced to Crown Villa. CHA received no other approval from HUD to use General Fund monies for Crown Villa expenses. Counsel also rejects Respondents' argument that, because the IPA audits for the years 2000 through 2004 refer to Crown Villa as a

[6] *Id.* at 15. *See also*, HUD's Reply to Respondents' Supplemental Exhibits and Brief.

payable for the public housing program, that constitutes HUD approval. IPA audits, counsel points out, are not requests for HUD approval before funds are spent, as required by Section 9(C) of the ACC. Government counsel also rejects Respondents' claim that they relied upon guidance provided by CHA's consultant, Orly Gilat. Counsel dismisses the evidence proffered by Respondents as having "nothing to do with the issues raised in this debarment action."

Counsel argues that there is cause for Respondents' debarment under 2 CFR 180.800(d). CHA acted irresponsibly in placing its General Fund monies in a position that resulted in their seizure. Additionally, CHA used its General Fund monies for non-CHA purposes without HUD approval and failed to safeguard Federal program funds, thus the General Fund monies were not used for their intended purpose under Section 9(C) of the ACC. The violation of 2 CFR 180.800 noted here is imputed to Respondents under 2 CFR 180.630(b) because they participated in, knew of, or had reason to know of the improper conduct.

Counsel concludes that Respondent Smith as CHA's Executive Director and Respondents Engel, Riley, and Snyder as Board members had supervisory responsibility over the operation and management of CHA. Additionally, they had an obligation to ensure that Federal funds were appropriately spent and that relevant contract provisions were complied with. Government counsel argues that Respondents failed to meet their obligations, thus the proposed three-year debarment of each of the Respondents should be imposed.

Respondent's Arguments

First, Respondents argue that HUD was well informed of CHA's plan to develop Crown Villa. Respondents cite, among other documents and correspondence, a May 22, 2000, letter to Charlie Hill from Howard Smith (Resp. Ex. 17), in which Respondent Smith informs Hill that the CHA is in "the process of finalizing the financial package for the development of a 60-unit mixed income senior housing project," and attaches a description of the project. Smith also discusses the cost of the land and the need to borrow $40,000.00 from FNB, among other things.

Respondents reject Government counsel's allegation that the execution of the two promissory notes on September 29, 2004, was a violation of Section 7[7] of the ACC. First, Respondents state that the notes were renewal notes. Note No. 18729 was first entered into on July 10, 2000, in the amount of $34,185.28 - the amount needed to complete the purchase of the land for the development of Crown Villa. Similarly, the execution of a new promissory note for Note No. 21216 was a renewal of a note which originated in September 2002. As Respondents see it, the execution of the new notes on September 29, 2004, "was merely the renewal of an existing indebtedness." Respondents explain the increased indebtedness associated with the two notes by asserting that Charlie Hill "encouraged the use of advancing funds in an effort to maintain control over the

[7] Section 7 of the ACC provides, in pertinent part, that "the HA shall not in any way encumber any such project, or portion thereof, without the prior approval of HUD."

property."[8] Respondents also cite to numerous exhibits in their brief that they claim "led [them] to believe they had support from HUD for the [Crown Villa] project."[9]

Respondents challenge HUD's conclusion that they acted irresponsibly in executing the two notes with a clause authorizing FNB to take possession of CHA funds on deposit if CHA defaulted on the notes. Respondents argue that "[r]egardless of the language in the promissory notes, FNB had the common law right to exercise the right of setoff," citing Nebraska cases. Respondents also argue that no one could have predicted that FNB would act to setoff the General Fund monies on deposit with FNB against the notes. Additionally, Respondents note that the HUD Omaha and Kansas City legal offices believe that FNB's action was improper and in violation of the Depository Agreement. Further, the U. S. Attorney in Nebraska has filed a complaint against FNB in federal court to recover the funds seized by FNB.[10] Respondents conclude that, because of the uncertainty and difficulty among lawyers with respect to whether FNB had the right to setoff, "CHA members would have a hard time knowing the legal ramifications of the setoff provision in the Note."[11]

Respondents also challenge HUD's allegation that the General Fund monies were improperly used. Respondents defend their actions with respect to Crown Villa on the basis of Section (9)(C)(1) of the ACC that allows a housing authority to use the General Fund for the "payment of cost of development," and Section 9(C)(3) that authorizes use of the Fund for "such other purposes as may be specifically approved by HUD." As Respondents view it, "the monies spent were used in the development and furtherance of" Crown Villa. Moreover, the CHA was of the "opinion and belief that the project had been approved by HUD in and through the various communications that were had between them and the HUD office in Omaha."

Respondents refute Government counsel's allegation that a deficiency judgment was entered against Crown Villa in favor of Tier One Bank. Respondents' exhibits 37 and 38 show that a Joint Motion to Dismiss was filed January 3, 2007, by the parties and the court dismissed the case in an Order dated January 9, 2007.[12]

---

[8] *See* Respondents' Brief Opposing Three-Year Debarment at 1. Exhibit 18, cited by Respondents in support of their assertion, is the May 24, 2000, letter from Charlie Hill to Respondent Howard Smith, approving CHA's request to borrow $50,000.00 from its retained earnings account. Exhibit 7 is an e-mail sent on July 29, 1999, by Charlie Hill to the CHA. In that e-mail, Charlie Hill writes, under the subject Columbus project, "[w]e strongly believe in the project you are working on and we have no problem with the housing authority advancing additional funds to maintain control over the property." *See also*, Letter of September 27, 2007, from Respondents' attorney at p. 2. In that letter, Respondents write that "[a]s these costs were accruing, the housing authority felt they had HUD's encouragement, backing and approval from the correspondence and personal contact they had during the ongoing development of [the Crown Villa] project."

[9] Resp. Brief at 3.

[10] *See United States v. First National of Nebraska*, No. 8:08CV122 (D. Nebraska filed ----------, 2008), filed May 12, 2008, as Respondents' Ex. 49.

[11] Resp. Brief at 2.

[12] Neither the Motion to Dismiss nor the Order specifically references the deficiency judgment. Nevertheless, because the exhibit was submitted by Respondents' counsel and counsel signed the Motion , the Debarring Official admitted the exhibit as represented by counsel.

Respondents next challenge Government counsel's contention that execution of the promissory notes was a willful violation of the ACC in light of the July 24, 2004, letter from the local HUD office directing CHA to cease using public housing funds for Crown Villa. Respondents restate their earlier argument that the notes executed on September 29, 2004, were no more than extensions of the earlier notes. Respondents assert that "[r]enewing [the] notes was not a violation of [the letter's] instruction." It is unclear, Respondents say, what they were expected to do when the notes became due. Respondents argue that if they did not renew the notes in September 2004, FNB would have exercised the setoff then, instead of in August 2005, when FNB did.

Respondents argue that prior to the July 29, 2004, letter from the Nebraska office, the author of that letter, Debra Lingwall, had written to Respondent Smith on February 13, 2003. In the February 13, 2003, letter, Ms. Lingwall "acknowledges the existence of the debt incurred by CHA to purchase the land and the borrowing from the reserves. The letter further indicated an understanding that the funds would be paid back when the units began leasing in the fall of 2003. The letter acknowledging the promissory note dated July 10, 2000, . . . did not in anyway indicate that the borrowing of these funds was improper, nor did it raise any objection to the right of setoff language."

Respondents point out that Government counsel's observation that Charlie Hill's July 29, 1999, e-mail was written five years before the execution of the promissory notes ignores the fact that the e-mail nonetheless was written less than one year before execution of the July 10, 2000, note, No. 18729. Respondents also take issue with Government counsel's suggestion that Crown Villa was not a CHA project. Respondents confess confusion at the claim, arguing that Charlie Hill encouraged the project and gave approval for funds to be used for the project. Respondents posit that Hill would not have taken the actions he did if Crown Villa was not intended to be a CHA property.

Respondents argue in their September 27, 2007, submission that they relied on CHA's consultant, Orly Gilat, for guidance as the Crown Villa project progressed. Respondents cite a letter of February 4, 2003 (attached as Exhibit C to their September 27, 2007, submission), from Gilat to a HUD Nebraska Office official that discusses the use of funds well over a year before the notes were executed. Respondents argue that if CHA had been advised that its actions would be in violation of the ACC, the two notes would not have been executed in September 2004. Respondents also refer to Exhibit E of their September 27, 2007, submission, a March 6, 2003, letter from CHA to the Nebraska office. The letter makes specific reference to the "review of the development Crown Villa." Respondents argue that these communications indicate that "various discussions and review were taking place concerning the Crown Villa Project." Additionally, Respondents submit that during the period 1999 through 2004, several audits and reviews of CHA's operations took place. CHA was never advised of any wrongdoing or actions that were in violation of the ACC or HUD regulations.

Respondents submit that the individual letters (Exhibits G, H, I, and J) attached to the September 27, 2007, letter attest to the fact that they are presently responsible and

that debarment is not necessary. Respondents also discuss several mitigating factors under 2 CFR 180.860.

Accordingly, Respondents request that the debarments proceedings be dismissed.

Findings of Fact

1. Respondents Engel, Riley, and Snyder, at all relevant times, were Board members of the CHA, a housing authority that received HUD funds.
2. Respondent Smith was the Executive Director of the CHA from August 1981 to December 2004, when he resigned.
3. The CHA entered into an ACC with HUD in 1996.
4. The ACC sets forth the provisions that a housing authority must observe with respect to the management and operation of projects under the ACC.
5. Crown Villa was a project that CHA developed using funds HUD provided CHA for the operation of projects covered by the ACC.
6. Crown Villa was not covered by the ACC.
7. CHA retained a consultant to advise the authority on the development of the Crown Villa project.
8. CHA received approval from the Nebraska HUD office, in a letter dated May 24, 2000, to borrow $50,000.00 of its General Fund monies towards the purchase of land for the development of Crown Villa.
9. The letter of May 24, 2000, conditioned its approval on the repayment of the funds borrowed.
10. CHA did not repay the $50,000.00 nor the additional funds that it advanced the Crown Villa project.
11. CHA spent an additional $123,196.00 of its public housing program (PHP) funds for which it did not make specific request nor receive specific approval from HUD.
12. In a July 29, 2004, letter from Debra Lingwall of the HUD Nebraska office to Respondent Smith, Ms. Lingwall directed the CHA and the CHA Board to discontinue immediately the use of PHP funds for Crown Villa.
13. CHA carried a $250,000.00 receivable from Crown Villa.
14. At a CHA Board meeting on September 13, 2004, at which Respondent Smith, who also served as the Secretary/Treasurer was present, the three Respondent Board members voted to adopt a resolution acknowledging that approximately $150,000.00 of CHA's PHP funds had been transferred to Crown Villa. The Resolution further provided for the advancement of additional funds to Crown Villa.
15. The Resolution was signed by Respondent Engel, as Chairman and Respondent Smith as Secretary/Treasurer
16. On September 20, 2004, the CHA board, including Respondents Engel, Riley, and Snyder, with Respondent Smith also in attendance, voted to renew promissory notes No.18729 and No. 21216 whose maturity date had been extended by FNB to March 31, 2005.

17. At the September 20, 2004, Board meeting, CHA's fee accountant recommended separating Crown Villa from public housing and moving the promissory notes off the public housing books because the notes represented a Crown Villa debt.
18. On September 29, 2004, Respondent Smith, on behalf of CHA, executed the two promissory notes between CHA and FNB with a maturity date of March 31, 2005.
19. The notes were for $81,023.00 and $100,000.00, respectively, with the proceeds therefrom used to fund the development of Crown Villa.
20. The notes were successor notes to the original notes of July 10, 2000, and September 19, 2002, respectively.
21. Both notes had a clause authorizing FNB to take possession of CHA's funds on deposit with FNB if CHA failed to make the payments on the notes.
22. CHA did not pay off the notes and on August 22, 2005, FNB took possession of all of CHA's funds on deposit with FNB.
23. Most of the funds seized by FNB (at least $80,199.84) were part of CHA's General Fund.[13]
24. Tier One Bank purchased the Crown Villa property in a trustee's sale in May 2005.

Conclusions

Based on the above Findings of Fact, I have made the following conclusions:

1. The CHA executed an ACC with HUD, which governs the use of HUD funds.
2. The CHA is governed by a Board of Directors which is responsible for making policy and providing overall supervision of the housing authority in accordance with HUD's requirements. Respondents Engel, Riley and Snyder have been members of the Board of Directors for the relevant time periods herein.
3. The day-to-day operations of CHA, which includes ensuring that operations conform to established practices and HUD requirements, including the ACC, are managed by an Executive Director. Respondent Smith was the Executive Director of CHA for the relevant time periods herein
4. The Respondents were participants in covered transactions as defined in 2 CFR Part 180.
5. The CHA had full knowledge of the Crown Villa project and knew or should have known that HUD had approved only $50,000.00 for the Crown Villa project.
6. The CHA approved transferring and advancing additional funds from the PHP for the Crown Villa development without requesting prior written approval from HUD.
7. Only the HUD-approved expenditures for Crown Villa satisfied the requirements of Section 9(C)(3) of the ACC.
8. PHP funds are part of the General Fund in accordance with Section 9(C) of the ACC.

[13] FNB seized a total of $88,062.80 that was held in five accounts owned by CHA. There is some uncertainty whether $6,547.78 of the total amount seized, which was identified as the service program account, should be treated as part of the General Fund. *See, e.g.*, ¶44 of the Complaint filed by the U.S. attorney's office in Nebraska to recover the seized funds from FNB (Resp. Ex. 49).

9. The CHA knew or should have known that, pursuant to Section 7(C) of the ACC, withdrawal of funds from the General Fund requires HUD's prior written approval.
10. The evidence supports the conclusion that the CHA demonstrated a history of failure to perform over the five-year period during which CHA gave Crown Villa $123,196.00 from its General Fund without HUD approval. CHA knew that Charlie Hill's letter of May 24, 2000 approved CHA to borrow only $50,000.00.
11. The HUD Nebraska office was informed by CHA of its plans for the construction of Crown Villa from the inception of the project[14] and continuing throughout its development[15].
12. None of the various communications between HUD and CHA[16] evidence HUD explicit approval for CHA to use PHP funds as required by the ACC.
13. CHA violated the ACC, which forbids a housing authority from encumbering its property without HUD's approval, by authorizing and executing the two promissory notes with FHB, which resulted in FHB's seizure of the CHA's deposits. *See* Sections 7 and 9 of the ACC.
14. The seized CHA deposits were public housing funds held in the General Fund under the ACC.
15. The pledge by CHA of deposits as security for the promissory notes was an improper use of CHA assets, not approved by HUD, and in violation of Section 9(C) of the ACC.
16. CHA was made aware of the precarious financial condition of Crown Villa. Accordingly, authorization by the CHA of the two promissory notes were willful violations of Sections 7 and 9 of the ACC.
17. CHA's allocation of $102,081.00 from the CHA General Fund without HUD's authorization over a multi-year period demonstrates a history of failure to perform in accordance with program requirements. *See* 2 CFR 180.800(b)(2).
18. CHA knew, having requested and received HUD authorization to borrow $50,000.00 from CHA's retained earnings, that CHA needed specific HUD approval to use public housing program funds for Crown Villa. *See* Section 9(C) of the ACC.
19. Although HUD may have encouraged CHA efforts with respect to Crown Villa, CHA had an obligation under the ACC to seek HUD approval for use of General Fund monies related to Crown Villa.
20. The CHA actions of allocation of funds on multiple occasions and the encumbrance of CHA property constitute a history of failure to perform under the ACC and cause for debarment under 2 CFR 180.800(b) and (d).
21. The CHA violated 2 CFR §180.800 and that conduct is imputed to Respondents pursuant to 2 CFR 180.630(b) because there is substantial evidence in the record that Respondents "participated in ... had knowledge of, or reason to know of the improper conduct."
22. Respondents' actions are considered willful because they were "intentional, or knowing, or voluntary, as distinguished from accidental." *See United States v.*

---

[14] *See e.g.,* Ex. 5 Gov't. Brief (Executive Summary of CHA's 2000 Annual PHA Plan)
[15] *See* Resp. Ex. 47.
[16] *See especially*, Resp. Exs. 7, 9, 11, 13, 17, 18, 20, 25, 30, 31,

Murdock, 290 U.S. 389 (1933). Respondents do not deny the willfulness of their acts, that is, that their acts were not intentional or voluntary. Rather, Respondents seek exoneration on the basis that their actions were excusable or justifiable. As shown below, their actions were neither justifiable nor excusable.

23. Respondents Engel, Riley, and Snyder voted at a Board meeting to transfer $150,000 to Crown Villa from the public housing program without receiving HUD's authorization as required by the ACC. Respondent Smith was also present at the Board meeting held on September 13, 2002 and signed the Board resolution as secretary/treasurer of CHA. The actions of Respondents were willful violations of the ACC and cause for debarment under 2 CFR 180.800(b)(1) because Respondents were aware of HUD's letter dated May 24, 2000 from Charlie Hill which approved the use of only $50,000.
24. Respondents also voted at a board meeting on September 20, 2004 to enter into two promissory notes with FNB for $81,023.60 and $100,000 respectively without obtaining HUD approval. These actions by Respondents were willful violations of the ACC and cause for debarment under 2 CFR 180.800(b)(1) because Respondents were aware of HUD's letter to the Executive Director and Board Members dated July 29, 2004 directing CHA and the Board "to discontinue the use of public housing funds for the Crown Villa project immediately."
25. Assuming *arguendo* that the execution of the two notes was "merely the renewal of an existing indebtedness," as claimed by Respondents, the renewal, because it was an encumbrance of CHA property, required the prior approval of HUD. Respondents did not seek nor obtain HUD approval; therefore, their action was in violation of Section 7 of the ACC.
26. Assuming *arguendo* that the Crown Villa project was approved by HUD, Respondents were not relieved of the requirement to seek HUD approval before voting or making a disbursal of funds to the project.
27. At a minimum, the actions of the Respondents breached their fiduciary duties of care owed to the CHA and the repeated breaches of fiduciary care were so serious and compelling that they affect the present responsibility of respondents and warrant debarment under 2 CFR §180.800(d) (formerly 24 CFR §24.800(d)).
28. The CHA sought the advice of a paid consultant, Orly Gilat, with respect to matters involving the Crown Villa project[17], but reliance by Respondents on the advice of their consultant does not fully exonerate Respondents or excuse their actions, especially since the CHA, Respondents and Executive Director received communication from HUD directing them to discontinue the use of public housing funds for the project. Although reliance on a consultant's expertise on matters related to the technical aspects of the project may be justifiable, it remains Respondents' responsibility as Board members to ensure that decisions affecting CHA comport with HUD's regulations and the ACC. Respondents cannot legally relieve themselves of this responsibility. Moreover, they cannot justify a witting or unwitting abdication of their responsibility by reference to the advice of a consultant.

[17] The scope of Gilat's involvement in the project is reflected in numerous documents attached as Exhibits to Respondents' brief. *See, e., g.*, Exs. 1, 3, 4, 5, 6, 9-12, 20, 26,

29. The CHA submitted an agreement with HUD to reimburse the PHP fund $204,162.00 from nonfederal funds, representing the expenditures for Crown Villa[18], however the agreement submitted for the record was not signed by the parties and there is not evidence in the record to support that the agreement was signed or would be signed by the parties. Accordingly this submission cannot be afforded weight in this determination.
30. Respondents offer several factors, which have been considered, in accordance with 2 CFR 180.860, in mitigation of their actions. First, Respondents state that there was no intent to do wrong by the uncompensated volunteer Board members or by Respondent Smith. The plea by Respondents is raised in the context of a mitigating factor. Although Respondents may have had no intent to do wrong, the actions by the Respondents resulted in a loss of thousands of dollars of federal funds. Thus, the seriousness of Respondents' actions argues strongly against considering their benign intent as a mitigating factor, as pressed by Respondents. *See* 2 CFR 180.845(a), which allows the Debarring Official to "consider the seriousness of [a Respondent's] acts or omissions" in determining whether to debar him. Respondents also argue that if the project had been successful, it would have added more low income housing to Columbus. Respondents' own argument suggests that the project's failure, in that it added no low-income housing to the city's housing stock, should give them no credit. While the Debarring Official does not agree with that conclusion, it is the project's failure that caused the CHA to suffer a financial loss. As discussed previously, the results of Respondents' actions fairly vitiate the mitigation effect of their well-intentioned actions. Respondents submit that none of the Respondents have a legal disability, nor face criminal or civil penalties, and they have all cooperated fully with the investigation. This factor was favorably considered in mitigation of Respondents' conduct. Respondents also argued that the mayor has found it difficult to find qualified persons to serve in appointive capacities and this action would have a chilling effect on prospective appointees. Although sensitive to the implications in this argument, Respondents provided no evidence to support their assertions and the argument does not overcome the need for the government to deal with responsible parties.
31. The evidence presented by the Government "has established the cause of debarment by a preponderance of the evidence" in accordance with 2 CFR 180.850(a). Further, the evidence demonstrates that a "cause for debarment exists" under 2 CFR 180.800(b)(2). Moreover, Respondents' misconduct shows that they are not presently responsible. "[I]t is well settled that a finding of present responsibility may be based on past irresponsible acts." *In re Chesley J. Doak*, HUDBCA No. 89-4364-D12, 1989 HUD BCA LEXIS 9, at *8 (May 24, 1989).
32. HUD has a responsibility to protect the public interest and take appropriate measures against participants whose actions may affect the integrity of its programs.

[18] The Agreement recites that it is effective January 22, 2008. The copy of the Agreement provided by Respondents' counsel as Ex. 39 of Respondents' Supplemental Exhibits and Brief is, however, unsigned.

33. HUD cannot effectively discharge its responsibility and duty to the public if participants in its programs or programs that it funds fail to act with honesty and integrity.

DETERMINATION

Based on the foregoing, including the Findings of Fact, Conclusions, and the administrative record, I have determined, in accordance with 2 CFR 180.870(b)(2)(i) through (b)(2)(iv), to debar Respondents for a period of three years from the date of this Determination. Respondents' "debarment is effective for covered transactions and contracts that are subject to the Federal Acquisition Regulation (48 CFR chapter 1), throughout the Executive Branch of the Federal Government unless an agency head or an authorized designee grants an exception."

Dated: SEP - 5 2008

Henry S. Czauski
Debarring Official